

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 14, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 97-1251

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

IN RE THE MARRIAGE OF:

DANIEL L. SARAUER,

PETITIONER-RESPONDENT,

v.

ROBIN C. SARAUER,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County:
MARY KAY WAGNER-MALLOY, Judge. *Reversed and cause remanded.*

Before Brown, Nettesheim and Anderson, JJ.

NETTESHEIM, J. Robin C. Sarauer appeals from a postjudgment order denying her motion to vacate and reopen a judgment of divorce on grounds of mistake, fraud and exceptional circumstances pursuant to § 806.07(1)(a), (c) and (h), STATS., respectively. The judgment was based upon a

marital property settlement which Robin had entered into with her former husband, Daniel. We uphold the court's denial of relief pursuant to § 806.07(1)(a) and (c) because Robin did not establish either mistake or fraud. However, because the judgment of divorce fails to divide a potentially valuable asset of the marital estate, exceptional circumstances warranting relief from the judgment may exist under para. (1)(h) of the statute. We reverse the order on this ground and remand for further proceedings on this question.

FACTS

Robin and Daniel were married on July 2, 1983. On June 5, 1996, Daniel filed for divorce. Throughout the proceedings, Daniel was represented by counsel while Robin was not. Two months prior to the final divorce hearing, Daniel provided Robin with a copy of a Marital Settlement Agreement drafted by his attorney. The agreement covered all issues, including property division, child custody and support, and waiver of maintenance. Robin signed the agreement without the advice of counsel despite recommendations that she seek legal advice.¹

On October 11, 1996, the parties appeared before a family court commissioner for a default divorce hearing. After receiving testimony from Robin and Daniel, the family court commissioner approved the parties' agreement and ordered that the agreement be incorporated into the judgment of divorce.

¹ At the hearing on Robin's motion to vacate the judgment, she testified that her accountant and a "few personal friends" advised her to hire a lawyer. Paragraph 29 of the "Marital Settlement Agreement" signed by Robin provides: "Attorney Geoffrey Dowse [Daniel's attorney] has, from the beginning of his discussions with [Robin] in this action, advised her of his role as attorney for her husband only and has suggested that with respect to any questions she may have, she would best consult with her own attorney."

Prior to the divorce, Robin and Daniel co-owned and operated Danny's Cafe Inc. The parties earned approximately \$80,000 per year from the operation of this business. According to the terms of the agreement and the ensuing judgment, Robin assigned all of her shares of stock in the corporation to Daniel, making him the sole owner. While the agreement assigned a value to the corporation's real estate and improvements, it did not assign any value to the goodwill of the business. The agreement additionally provided that Robin would be employed at the café as long as Daniel owned it. However, two months after the divorce, Daniel terminated Robin's employment.

In response, Robin, now represented by counsel, filed a motion for enforcement of the judgment. Later, however, Robin amended her motion, seeking instead to vacate and reopen the judgment pursuant to § 806.07(1)(a), (c) and (h), STATS. Robin's motion and supporting affidavit contended that she had waived maintenance in exchange for employment at the cafe and that Daniel's subsequent termination of her employment amounted to fraud. Robin additionally alleged that Daniel's financial disclosure statement had failed to provide a valuation of Daniel's pension, coin collection and certain components of the business. Robin also contended that she did not have correct and complete information when she signed the Marital Settlement Agreement and that her choice to do so was not conscientious, deliberate and well informed.

After conducting a hearing on Robin's motion, the trial court rejected Robin's request for relief from the judgment. The court held that Robin had not demonstrated "fraud, mistake, misrepresentation or exceptional circumstances, or any other grounds under § 806.07 of the Wisconsin Statutes, to reopen this Judgment" Robin appeals.

DISCUSSION

Relief from Judgment under § 806.07(1)(a) and (c), STATS.

We first address Robin's claims under § 806.07(1)(a) and (c), STATS. Paragraph (1)(a) allows relief from a judgment on grounds of "[m]istake, inadvertence, surprise, or excusable neglect." Paragraph (1)(c) allows such relief on grounds of "[f]raud, misrepresentation, or other misconduct of an adverse party." Robin testified at the motion hearing that at the time she signed the agreement she was mistaken as to the value of certain marital assets because of misinformation in Daniel's financial disclosure statement. Robin additionally testified that she waived maintenance based on the provision in the agreement providing for her employment at Danny's Cafe. Robin argues that her subsequent termination from that employment was fraudulent. Rejecting Robin's testimony, the trial court found that Robin had failed to demonstrate either mistake or fraud.

Although a property division in a divorce judgment is not subject to the continuing jurisdiction of the family court, the court has the discretionary authority to modify a property division under § 806.07, STATS. *See Spankowski v. Spankowski*, 172 Wis.2d 285, 290, 493 N.W.2d 737, 740 (Ct. App. 1992). We will not reverse a discretionary determination to deny a motion for relief under § 806.07 if the record reflects that the trial court employed a process of reasoning based on the facts of record or those facts which can be reasonably inferred from the record and arrived at a conclusion based on logic and founded upon the proper legal standards. *See Spankowski*, 172 Wis.2d at 290, 493 N.W.2d at 740.

We conclude that the trial court did not erroneously exercise its discretion when it concluded that Robin failed to demonstrate a basis for relief under § 806.07(1)(a) and (c), STATS. The Marital Settlement Agreement, as drafted by Daniel's attorney, was provided to Robin approximately two months

prior to the final divorce hearing. This gave Robin more than sufficient time to reflect upon the agreement. Robin was informed that Daniel's attorney was not representing her interests and that she should seek counsel. Robin chose not to do so. And, at the divorce hearing, Robin acknowledged that she wished to proceed without legal representation.

Robin was also provided with a copy of Daniel's financial disclosure statement prior to the final hearing. This document listed the parties' various assets and their values. Robin was asked by the family court commissioner whether she and Daniel had completely disclosed all of their assets and debts to one another. Robin responded that they had. Robin was additionally questioned with respect to her waiver of maintenance and her understanding that as a result of this waiver she could never request this form of support from Daniel. Robin responded that she understood. Finally, Robin was asked whether she believed the provisions of the Marital Settlement Agreement to be fair and reasonable under the circumstances. Robin responded in the affirmative. As requested by both Robin and Daniel, the agreement was then incorporated into the judgment.

At the hearing on the motion, Robin testified that Daniel's financial disclosure information was incorrect and that she was mistaken as to the effect of her waiver of maintenance. She also testified that she did not obtain counsel during the two months prior to the final hearing because Daniel had advised her not to do so. In rejecting Robin's motion, the trial court noted that Robin's testimony was directly contradicted by her testimony before the family court commissioner. There, Robin had stated that the parties had made a full disclosure of all of their assets, that she agreed to the terms of the stipulation as being fair and reasonable, and that she wished to proceed without legal representation. The court

employed an estoppel approach against Robin, although not expressly using the word. The court said:

Now, if there has been a violation of the marital property settlement there are means by which the parties can pursue those violations, and they should be pursued in that manner for motions for contempt. But reopening a judgment of divorce when there is sworn testimony that one understand it, that one entered into it fairly, is serious business and that agreement was entered.

It is obvious that the trial court found Robin's testimony in support of the agreement before the family court commissioner to be more credible than her testimony at the motion hearing where she sought to vacate the judgment. Because the trial court is in a better position to determine the credibility of Robin's testimony, we defer to the trial court's determination. *See Schultz v. Schultz*, 194 Wis.2d 799, 807, 535 N.W.2d 116, 119 (Ct. App. 1995). Based on this evidence, we uphold the court's finding that Robin had not demonstrated grounds for relief under § 806.07(1)(a) and (c), STATS.²

Section 806.07(1)(h), STATS.

Robin also premised her motion on § 806.07(1)(h), STATS., which permits the trial court to grant relief from a judgment for “[a]ny other reasons justifying relief.” Relief under this section “may only be afforded in extraordinary circumstances.” *Eau Claire County v. Employers Ins.*, 146 Wis.2d 101, 109, 430 N.W.2d 579, 582 (Ct. App. 1988).

² As to Robin's claim that Daniel's subsequent termination of her employment amounted to fraud, we agree with the trial court that Robin's claims which stem from her termination are enforcement issues which do not bear upon whether she was defrauded at the time she entered into the agreement. Here, Robin was seeking to vacate the judgment, not to enforce it. Moreover, Robin presented no evidence supporting her claim of fraud or misrepresentation. The mere fact of her termination by Daniel does not constitute fraud or misrepresentation per se.

In this case, Daniel's financial disclosure statement and the ensuing Marital Settlement Agreement assigned values to the corporation's real estate and improvements. However, these documents did not assign any value to the goodwill component of the corporate business.³ As a result, the ensuing judgment of divorce did not divide this potential asset. The trial court's ruling rejecting Robin's motion under the "exceptional circumstances" provision of § 806.07(1)(h), STATS., was based on the same estoppel logic and language which the court used in rejecting Robin's request for relief under paras. (1)(a) and (c): namely, Robin would not be heard to disavow a settlement agreement which she had expressly asked the family court commissioner to approve.

With respect to Danny's Cafe Inc. the Marital Settlement Agreement provided as follows:

[Daniel] is being awarded the corporation known as "Danny's Cafe Inc." [Robin] is co-owner of this business at the present time. She shall assign all shares of stock owned by her to [Daniel] upon the completion of this divorce. She shall sign such other documents as may be necessary to transfer total and complete ownership of the business to [Daniel].

The valuation of Danny's Cafe Inc. as set forth in the financial disclosure statement is \$375,000 which represents the purchase price of the real estate plus improvements made on the property. That value is then reduced by \$350,000, the amount of debt which encumbers the property. Therefore, the net value of Danny's Cafe Inc. is represented as \$25,000.

³ "Goodwill" is defined as "the custom of a trade or business: the favor or advantage in the way of custom that a business has acquired beyond the mere value of what it sells whether due to the personality of those conducting it, the nature of its location, its reputation for skill or promptitude, or any other circumstance incidental to the business and tending to make it permanent." WEBSTER'S THIRD NEW WORLD INTERNATIONAL DICTIONARY 979 (1976).

At the motion hearing, Robin's counsel attempted to present testimony as to a valuation method for the "goodwill" of a business by offer of proof: "[Robin] has since learned that a customary way of valuing a business is four or five times earnings in terms of the value of a business and that would establish, if they earned \$80,000 draw from a business, a value of three to four hundred thousand for the business" The trial court rejected the offer of proof stating that "[the] way an accountant assesses a business is not before us today."

As we have already noted, although the trial court did not expressly use the word "estoppel" in its decision, that principle underpins the court's decision. We address the trial court's ruling in this light since it directly influenced the court's ultimate determination to deny Robin's request for relief under § 806.07(1)(h), STATS. See *Daniel R.C. v. Waukesha County*, 181 Wis.2d 146, 156, 510 N.W.2d 746, 750 (Ct. App. 1993) (We "do not necessarily review a decision based upon the legal term of art used by the circuit court to characterize its reasoning." Rather, "[w]e review the overall analysis used by the court.").

Our supreme court has held that when a party agrees to a certain disposition of the parties' financial obligations and the agreement is made a part of the judgment of the court, the party may thereafter be estopped from seeking release from the terms of the agreement. See *Rintelman v. Rintelman*, 118 Wis.2d 587, 594, 348 N.W.2d 498, 501 (1984). Although *Rintelman* involved a request to modify the maintenance provision of a judgment, whereas here we deal with a property division provision, we nevertheless deem *Rintelman* instructive.

In *Rintelman*, the supreme court held that a party is estopped from requesting relief from a stipulation if (1) both parties entered into the stipulation freely and knowingly, (2) the overall settlement is fair and equitable and not illegal

or against public policy and (3) one party subsequently seeks to be released from the terms of the court order on the grounds that the court could not have entered the order it did without the parties' agreement. *See id.* at 596, 348 N.W.2d at 502-03.

Here, Robin surrendered her interest in the corporate stock to Daniel based on a property division which valued the real estate and physical assets of the corporation but not its goodwill. It is well established that "goodwill of a going concern can be a marketable asset," the value of which may be assessed. *See Sommerfield v. Sommerfield*, 154 Wis.2d 840, 853, 454 N.W.2d 55, 61 (Ct. App. 1990).⁴ Based upon Robin's offer of proof, the goodwill of Danny's Cafe Inc. was in the \$300,000 to \$400,000 range. If that is true, the divorce judgment in this case is seriously flawed because it fails to divide one of the more valuable assets of the marital estate. Under that circumstance, the judgment is neither fair nor equitable under the second *Rintelman* factor.

We, of course, cannot say any of this with certainty because the trial court rejected Robin's offer of proof. However, we do hold at a minimum that Robin is not estopped from challenging the judgment. We therefore reverse the trial court's order and remand for further proceedings on Robin's motion. On

⁴ We note that many courts view "goodwill" as a divisible marital asset. *See Endres v. Endres*, 532 N.W.2d 65, 68 (S.D. 1995) ("The prevailing view of courts that have considered the question [of goodwill in a marital property division] is that goodwill of a professional practice or business is a business asset with a determinable value and is marital property subject to division in a divorce proceeding."); *Kahn v. Kahn*, 536 N.E.2d 678, 682 (Ohio Ct. App. 1987) ("Goodwill is an integral part of the valuation of a professional business in a divorce proceeding."); *Strauss v. Strauss*, 647 A.2d 818, 825 (Md. Ct. Spec. App. 1994) ("[G]oodwill, although an intangible asset, is nonetheless a legally protected property right.... [It] is to be valued and equitably divided pursuant to the ... marital property analysis."); *In re Marriage of Leon*, 399 N.E.2d 1006 (Ill. App. Ct. 1980) (divorce case remanded with directions to hear evidence as to goodwill value of husband's business).

remand, the court shall determine whether, in fact, Danny's Cafe Inc. has any goodwill value. If the answer is yes, the court shall then determine the value of the goodwill. Based upon that determination, the court can then ultimately answer whether the failure to include that value in the marital estate constitutes an extraordinary circumstance under § 806.07(1)(h), STATS., warranting relief from the judgment.⁵

CONCLUSION

Although we uphold the trial court's ruling denying Robin's motion for relief from the judgment pursuant to § 806.07(1)(a) and (c), STATS., we reverse the ruling denying relief pursuant to § 806.07(1)(h) and remand for further proceedings on that issue consistent with this opinion.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.

⁵ Robin additionally argues that grounds for relief exist under § 806.07(1)(h), STATS., because Daniel failed to assign a value to his pension and his coin collection. However, unlike the goodwill component of the corporate stock, the financial disclosures of both parties specifically alluded to these two assets, although assigning a "zero" value to them. Moreover, Robin offered no evidence or offer of proof at the postjudgment proceedings as to the potential value of these two assets. Therefore, we hold that Robin is estopped from seeking relief from the judgment as to these two assets.

